79-SBE-012

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
JAMES W. HENDERSON)

For Appellant: James W. Henderson, in pro. per.

For Respondent: Bruce W. Walker
Chief Counsel

Jacqueline W. Martins
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of James W. Henderson against a proposed assessment of additional personal income tax in the amount of $117.04 for the year 1975.

The issue for determination is whether respondent's denial of appellant's claimed dependent care expense deduction in accordance-with the limitation contained in section 17262, subdivision (d), of the Revenue and Taxation Code was proper.

Appellant reported $17,926 in adjusted gross income on his 1975 California personal income tax return. From that amount he deducted $1,640 which was the total amount of dependent care expenses he incurred during that year. Respondent disallowed the deduction on the basis of the limitation contained in section 7262, subdivision (d), of the Revenue and Taxation Code [1] and proposed the assessment which is the subject of this appeal.

We have previously been presented with a question concerning the application of the limitation contained in section 17262, subdivision (d), of the Revenue and Taxation Code in the Appeal of Barbara J. O'Connell, decided by this board May 10, 1977. In determining that matter adversely to the taxpayer, we examined the legislative history of the federal counterpart to section 17262 (Int. Rev. Code of 1954, § 214.) and concluded that dependent care expenses were deductible only in accordance with the specific limitations provided in section 17262 of the Revenue and Taxation Code. Under the facts presented by this appeal, an application of the statutory limitation resulted in the disallowance of the entire deduction claimed for dependent care expenses.

Appellant has not challenged respondent's computation of the proposed assessment. However, he does contend that the statute is unconstitutional. We believe that the adoption of Proposition 5 by the voters on June 6, 1978, adding section 3.5 to article III of the California

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1/ Subdivision (d) of section 17262 reads in pertinent part:

> If the adjusted gross income of the taxpayer exceeds twelve thousand dollars ($12,000) for the taxable year during which the expenses are incurred, the amount of the deduction shall be reduced by fifty cents ($0.50) for each one dollar ($1) of such income above twelve thousand dollars ($12,000). ...

Constitution, 2/ precludes our determining that the statutory provision is unconstitutional or unenforceable. In any event, this board has a well established policy of abstention from deciding constitutional questions in appeals involving deficiency assessments. (Appeal of Hubert D. Mattern, Cal. St. Rd. of Equal., June 29, 1978; Appeal of Harold and Sylvia Panken, Cal. St. Bd. of Equal., Sept. 13, 1971.) This policy is based upon the absence of specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an adverse decision in a case of this type, and our belief that such review should be available for questions of constitutional importance. This policy properly applies to this appeal.

Finally, appellant argues that interest should not be imposed on the deficiency. Section 18688 of the Revenue and Taxation Code provides without any qualification that interest upon the amount assessed as a deficiency shall he assessed, collected and paid at the appropriate rate from the date prescribed for the payment of the tax until the date the tax is paid. In view of this statutory mandate, we have consistently held that the imposition of interest is mandatory. (See, e.g., Appeal of Avis J. Luer, Cal. St. Bd. of Equal., June 3, 1975.) We have been offered no reason to deviate from that position in this appeal.

For the foregoing reasons, we conclude that respondent's action in this matter must be sustained.

2/ Section **3.5 of** article III provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Appeal of James W. Henderson

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of James W. Henderson against a proposed assessment of additional personal income tax in the amount of $117.011 for the year 1975, be and the same is hereby sustained.

Done at Sacramento, California, this 9th day of January, 1979, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member